Supreme Court, U.S.
FILED
AUG 11 2000
CLERK

No. 99-1240

IN THE

Supreme Court of the United States

October Term, 2000

THE BOARD OF TRUSTEES OF THE UNIVERSITY, OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON DISABILITY IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON DISABILITY IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed, pursuant to consents of the parties filed with the Clerk,[1] on behalf of the National Council on Disability. The Council is an independent federal agency comprised of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Pursuant to its statutory mandate, 29 U.S.C. § 781 (1994), the Council is charged with reviewing federal laws, regulations,

[1] Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus or counsel contributed money or services to the preparation and submission of this brief.

programs, and policies affecting people with disabilities, and making recommendations to the President, the Congress, officials of federal agencies, and other federal entities, regarding ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.

The Council plays a major role in developing disability policy in America, and, in 1986, first proposed the concept of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1990), the statute at issue in this case. In 1988, the Council developed the original ADA bill that was introduced in the 100th Congress. Congress relied on and acknowledged the influence of the Council and its reports during congressional consideration and passage of the ADA; members and staff of the Council testified at congressional hearings on the legislation. Under its current statutory mandate, the Council is responsible for gathering information about the implementation, effectiveness, and impact of the ADA. The Council is thus intensely interested in ensuring that the ADA is interpreted and implemented in a manner consistent with the purposes for which it was proposed. It is also uniquely qualified to provide the Court with information about the background and framing of the ADA, implementation of the Act, and other information concerning policy issues affecting persons with disabilities. The Council is particularly concerned with and distinctively informed about issues that are at the core of these cases -- the documented record of denials of equality and due process to individuals with disabilities by State and local governments, and the congruence and proportionality of the measures the ADA imposes on governmental entities to address and remedy the denials of equal protection and due process that people with disabilities have experienced and continue to experience.

SUMMARY OF ARGUMENT

The ADA was the culmination of 25 years of methodical congressional study, measured legislative steps, and finely

tuned negotiation regarding the problem of discrimination on the basis of disability and the appropriate remedies to address such discrimination. The careful, step-by-step consideration, unrivaled in civil rights law, that Congress afforded the issue of disability discrimination produced a solid legal and factual foundation for the ADA, engendered an enlightened and sophisticated congressional understanding of the nature and forms of discrimination on the basis of disability, and enabled Congress to devise, field-test, and refine moderate, workable remedies for such discrimination. Congress established *amicus*, in part, to assist with these efforts; consistent with its charge, *amicus* played a role in systematically examining such discrimination and federal laws addressing it and in making and explaining proposals, including, in particular, the ADA, for ameliorating such discrimination.

In the ADA, Congress made explicit findings both that discrimination on the basis of disability is pervasive, *i.e.*, diffused throughout every part, in American society, and that it persists in various particular areas of State functions and activities, including "access to public services" and employment. In making these findings, Congress had solid support in the documentation before it. Also based on a solid documentary foundation was Congress's belief that even though most States have laws prohibiting discrimination and establishing services and protections, the States are nonetheless engaged in widespread and serious discrimination on the basis of disability.

Congress was also on solid ground in its conclusion that State discrimination on the basis of disability has Fourteenth Amendment significance. In considering the ADA, Congress had before it a considerable body of case law holding various forms of State discrimination on the basis of disability to be violations of the Fourteenth Amendment. The Court's decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), decision makes it abundantly clear that some types of discriminatory actions by governmental entities violate equal protection because they are not "rational." In

situations where, as with disability, "negative attitudes" and "irrational prejudice" toward a class of citizens have become the accepted practice and the standard way of dealing with those citizens, and have become ingrained in the policies, practices, and even the facilities of American society, including particularly State governments and their components, Congress is exercising a fundamentally important role under the Fourteenth Amendment when it identifies and prohibits such irrational actions.

Having identified a well-documented problem of State discrimination in violation of the Fourteenth Amendment, Congress negotiated extensively and crafted modest, congruent, and proportional remedies for irrational and unfair discrimination by States. Congress had good reason based on past experience to know that a broadly-worded prohibition of discrimination on the basis of disability would not be sufficient to address such discrimination. Because identical treatment can result in disability discrimination and because exclusion and other egregious deprivations on the basis of disability often occur in the absence of hostile animus, Congress elected to provide real equality, and not just a formal facade of equality, by establishing such ADA requirements as reasonable accommodation, barrier removal, auxiliary aids, proscribing standards or methods administration that have the effect of discrimination, and prohibiting of discriminatory qualification standards and selection criteria, all of which had been developed and tested under prior statutes and regulations.

These and other ADA provisions were carefully fine-tuned during protracted congressional consideration and debates, involving extensive negotiations and compromises. *Amicus* believes that, in contrast to its moderate original version of the ADA, in enacting the final version of the ADA Congress moved in the direction of crafting standards that are unnecessarily lenient and limited. The ADA's requirements and coverage certainly are not incongruous or

disproportionate in relation to the serious pattern of State discrimination they address.

ARGUMENT

I. The ADA Was the Culmination of 25 Years of Methodical Congressional Study of Discrimination on the Basis of Disability and the Appropriate Remedies to Address Such Discrimination.

As the Court has recognized,[2] the Americans with Disabilities Act (ADA) had its origin in a proposal of *amicus* the National Council on Disability.[3] As the ADA passed the Senate, Senator Dole observed:

> The ADA is . . . a good example of bipartisanship in action. The bill originated with an initiative of the National Council on Disability, an independent Federal body comprised of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities. 135 CONG. REC. S 10790 (Daily Ed. Sept. 7, 1989) (remarks of Sen. Dole).

Amicus, in proposing the ADA, and the 101st Congress, in enacting it, based their actions on a quarter century of prior congressional investigation and documentation, and measured legislative steps -- extraordinarily extensive factfinding and investigation to establish a factual and legal foundation for enactment of the ADA.

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[2] *Sutton v. United Airlines*, 119 S.Ct. 2139, 2147-48 (1999) (recognizing the Council and its then staff person, the author of this brief, as having proposed and written the original version of the ADA).

[3] The Council was initially named the National Council on the Handicapped. Its name was changed to the National Council on Disability in 1988. Pub. L. No. 100-630, tit. II, § 205(a), 102 Stat. 3310 (1988).

A. Congressional Investigation and Information Base

1. Hearings

Congress held eighteen hearings to consider the ADA -- two in the 100th Congress and sixteen in the 101st [4] -- in addition to scores of congressional hearings over the years that examined discrimination on the basis of disability in various areas of activity, such as education, employment, transportation, housing, communications, residential treatment facilities, and public buildings.

2. Congressionally Commissioned Studies

In addition to its direct fact-gathering through its own investigation and hearing processes and the resources and compilations available to it through the Library of Congress and the Congressional Research Service,[5] Congress formally

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[4] *See* S. Rep. No. 101-116, at 4-5 (1989) (listing 4 committee and subcommittee hearings in 101st Cong., and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-485, pt. 2, at 24-28 (1990) (listing 4 committee and subcommittee hearings in 101st Cong., and a subcommittee hearing and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-485, pt. 3, at 24 (1990) (listing 4 committee and subcommittee hearings in 101st Cong.); H.R. Rep. No. 101-485, pt. 4, at 28-29 (1990) (listing 2 subcommittee hearings in 101st Cong.). The report of the House Committee on Public Works and Transportation, H.R. Rep. No. 101-485, pt. 1 (1990) does not describe its hearings, but two subcommittee hearings were held in the 101st Congress. *See Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 101st Cong. (1990).

[5] For example, three reports of the Congressional Research Service were cited as authority in amicus's report proposing the ADA. TOWARD INDEPENDENCE, App. at A-59 to A-60 (1986), citing Nancy Lee Jones, *Judicial Decisions Discussing "Program or Activity Receiving Federal Funds" Under Section 504 of the Rehabilitation Act Before and After Grove City College v. Bell*, Congressional Research Service, The Library of Congress (1985); Nancy Lee Jones, *Overview of Major Issues Under Section 504 of the Rehabilitation Act*, Congressional Research Service, The Library of Congress (1985); Nancy Lee Jones, *Proposed Coverage of Handicapped Persons By Title VII of the Civil Rights Act: An Analysis of*

sought additional information and recommendations by establishing, by statute or congressional appointment, several investigatory and advisory instrumentalities, and vesting them with responsibility for studying various facets of discrimination on the basis of disability and proposing ways to address and eliminate it.

These instrumentalities include:

(a) the National Commission on Architectural Barriers, established by statute and charged with studying the extent to which architectural barriers prevented access to public buildings and to propose measures to eliminate existing barriers and prevent new ones from being created, Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965);

(b) the White House Conference on Handicapped Individuals, whose statutory mission was to convene a national gathering "to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with [disabilities]," with equal protection as a key focus, Pub. L. No. 93-516, §§ 300-306, at §§ 302, 301(4), 88 Stat. 1631 (1974), and which culminated in a May 1977 gathering in Washington, DC of approximately 3,700 individuals from every state and U.S. territory, representing over 100,000 people who attended local, state, and territorial conferences, that generated 815 formal recommendations addressing 287 issues;

(c) the U.S. Commission on Civil Rights, which was given jurisdiction over disability discrimination in 1978, Pub. L. No. 95-444, 92 Stat. 1067 (1978), and which, in 1983, published ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (hereinafter ACCOMMODATING THE SPECTRUM), a comprehensive report on discrimination on the basis of disability which documented the types of discrimination

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H.R. 370, Congressional Research Service, The Library of Congress (1985).

people with disabilities encounter and provided a summary of case law and a conceptual framework for understanding and addressing such discrimination, that has been cited by the Court as authority regarding the nature of such discrimination, *Alexander v. Choate*, 469 U.S. 287, 295-96, nn. 12 & 16 (1985);

(d) *amicus*, the National Council on Disability, which Congress established in 1984 as an independent federal agency charged with reviewing federal laws and programs affecting people with disabilities and making recommendations regarding ways to make such laws and programs more effective, Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984), codified as amended at 29 U.S.C. § 781, and which in two of its reports to the President and Congress first proposed the concept of an ADA and then published the original draft of the ADA that was later introduced in Congress in 1988, NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 18-21 (1986) (hereinafter TOWARD INDEPENDENCE); NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE 27–39 (Andrea H. Farbman ed., 1988) (hereinafter ON THE THRESHOLD OF INDEPENDENCE); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9379-9382 (1988); H.R. 4498, 100th Cong. 2d Sess.; *see* 134 CONG. REC. 9599-9600 (1988) (statement of Rep. Coelho);

(e) the Advisory Commission on Intergovernmental Relations, a bipartisan body (comprised of three U.S. Senators, three members of the House of Representatives, three officials from the U.S. Executive Branch, four governors, four mayors, three members of State legislatures, three elected county officials, and three private citizens), Pub. L. No. 86-380, 73 Stat. 703 (1959), which in 1989 issued a report titled DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL that identified various barriers to governmental compliance with disability rights mandates, and was based in part on a survey of State officials

regarding their assessment of impediments to employment of persons with disabilities in State government, *id.* at 2, 72-73;

(f) the General Accounting Office (GAO), which, in response to a request by members of Congress, during congressional consideration of the ADA in January 1990, for information about the costs of workplace accommodations and of avoiding or removing architectural, transportation, and communication barriers, conducted a literature review of published studies, queried a wide range of industry groups and disability organizations, identified twelve reports that provided such information, and summarized their findings, U.S. General Accounting Office, *Persons with Disabilities: Reports on Costs of Accommodations*, A Briefing Report to Congressional Requesters, at 12, 11-25 (January 4, 1990); and

(g) the Task Force on the Rights and Empowerment of Americans with Disabilities, appointed in May 1988 by the Chairman of the House Subcommittee on Select Education to gather information on the extent and nature of disability discrimination, which conducted 63 public forums around the country attended by over 7,000 persons, submitted eleven interim reports to Congress, provided testimony at hearings on the ADA in both the House and Senate,[6] issued a final report, *From ADA to Empowerment; The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* (1990) (hereinafter *From ADA to Empowerment*), and concluded generally that Americans with disabilities face

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[6] *See* S. Rep. No. 101-116, at 4, 6, 8-9, 16, 17 (1989); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong. at 18-20, 252-58 (1989); H.R. Rep. No. 101-485, pt. 2, at 25, 26, 27-28 (1990); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. at 1038-43, 1328-35 (1988); *From ADA to Empowerment: The Report of the Task Force on Rights and Empowerment of Americans with Disabilities*, at 18 (1990).

"massive, society-wide discrimination and paternalism," *id.* at 18, 19.

The statutory and other sources of authority of these entities, a description of their missions, the titles of their principal relevant reports, and a summary of their overall pertinent results are presented in tabular form in the Appendix to this brief. Together, they represent a powerful, twenty-five year effort undertaken by Congress to commission sustained investigation into the nature and scope of discrimination on the basis of disability and to identify workable measures for addressing it.

3. Other Resources Before Congress

In addition to legislatively generated information and documents, *amicus,* in developing its ADA proposal, and Congress, in its consideration of the legislation, had the benefit of a variety of other informational resources. Among these were three documents that Congress expressly relied on: (1) *Report of the Presidential Commission on the Human Immunodefiency Virus Epidemic* (1988) (discussed the widespread prevalence and serious repercussions of baseless discrimination encountered by those with HIV, and expressly endorsed *amicus*' ADA proposal, *id.* at 119-123); (2) Louis Harris and Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream*, (1986) (presented results of first nation-wide, telephone survey of Americans with Disabilities, including wide array of statistical information about the incomes, job status, and other characteristics, activities, and viewpoints of people with disabilities; among findings were that approximately two-thirds of individuals with disabilities of working age were not working, and that two-thirds of those not working want to work, *id.* at 47, 50-51); and (3) Louis Harris and Associates, *The ICD Survey II: Employing Disabled Americans*, (1987) (provided data from Harris survey of employers' policies, practices, and attitudes of employers. The Harris agency reported that three-fourths of managers of businesses affirmed that people with disabilities

"often encounter job discrimination from employers." *Id.* at 12.

4. Overall Documentary Base for the ADA

ADA committee reports expressly cite seven documents as providing support for congressional conclusions regarding the nature and extent of discrimination on the basis of disability: *amicus*' TOWARD INDEPENDENCE (1986) and ON THE THRESHOLD OF INDEPENDENCE (1988); the U.S. Commission on Civil Rights report ACCOMMODATING THE SPECTRUM (1983); the two Harris polls; the *Report of the Presidential Commission on the Human Immunodefiency Virus Epidemic* (1990); and *From ADA to Empowerment*, the report of the Task Force on the Rights and Empowerment of Americans with Disabilities. S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The cited documents, however, themselves refer to and build upon the whole body of information about discrimination on the basis of disability and ways to address it developed and relied on in Congress' twenty-five years of study and documentation of these issues.

B. In Enacting the ADA, Congress Addressed a Documented Pattern of Discrimination by States That Falls Within Its Power to Enforce the Fourteenth Amendment.

1. Congress Addressed a Documented Pattern of Discrimination by the States.

The petitioners contend that in enacting the ADA Congress did not address a "predicate" of discriminatory conduct by the States. Petitioners' Br. at 30. Both the statutory language and the documentation and legislative record Congress had before it fly in the face of this contention.

a. Congressional Findings

Petitioners' brief argues, emphatically, that "[n]ot one instance of such conduct is identified, whether in the findings

and purpose section of the law or in any other Title of the Act." Petitioners' Br. at 31. The legal relevance of petitioners' assertion is dubious, as this Court has never stated that the constitutional basis for a congressional enactment must be explicitly spelled out in Findings, Purposes, or the body of a statute.

Even if petitioners' contention had legal significance, however, it is manifestly not accurate. Congress not only mentioned several forms of State discrimination in its findings, but it went much further and found that discrimination on the basis of disability is "pervasive" in America. 42 U.S.C. § 12101(a)(2). The word "pervasive" means "diffused throughout every part of," WEBSTER'S NEW COLLEGIATE DICTIONARY (7th Edition 1967) at 631, or "extending throughout," WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989) at 1076. It makes no sense for petitioners to contend that "pervasive" discrimination does not encompass the States.

Moreover, Congress left no doubt about the role of States as major discriminators when it made a specific finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Significantly, in finding that discrimination persists in the area of "access to public services," Congress laid a solid "predicate" for its enactment of Title II of the ADA. Title II is titled "Public Services" and applies to the "services, programs, or activities of a public entity," a term which is defined to mean "any State or local government" or their instrumentalities. 42 U.S.C. §§ 12132, 12131(1)(A) & (B). Among the other areas of discrimination expressly identified by the Congress in the finding, discrimination in voting and institutionalization involve activities attributable exclusively to State and local governments; education and transportation are functions in which State and local governments play

predominant roles; and employment, communication, recreation, and health services are all areas in which the States are significantly involved and thus share with other nongovernmental entities responsibility for the widespread discrimination Congress identified.

b. Documentation of State Discrimination

In making a finding that discrimination on the basis of disability was "pervasive," Congress had solid support in the documentation before it. *See* ON THE THRESHOLD OF INDEPENDENCE at 27, § 2(a)(2) ("discrimination against persons with disabilities continues to be a serious and pervasive social problem"); TOWARD INDEPENDENCE, App. at A-3 ("severity and pervasiveness of discrimination against people with disabilities is well-documented)"; ACCOMMODATING THE SPECTRUM at 159, Conclusion 1 ("discrimination against handicapped persons continues to be a serious and pervasive social problem"); Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* at 16 ("overwhelming evidence" of "massive, society-wide discrimination . . ."); U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS, 40 (1980) (Statement of Charles W. Hoehne, spokesperson for the White House Conference) (White House Conference reports make it "very plain that individuals with disabilities have been and continue to be . . . subjected to massive discrimination in this country").

Also well-documented was the existence of widespread discrimination in various categories of State activities. In *Accommodating the Spectrum*, the Commission on Civil Rights examined various categories of activities in some detail and noted extensive and well-documented discrimination in regard to public education systems,[7]

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[7] *Id.* at 27-29.

confinement in public residential institutions,[8] involuntary sterilizations pursuant to State laws,[9] inaccessible public transportation terminals and vehicles,[10] and inaccessible public buildings.[11]

In discussing the latter, the Commission effectively refuted the petitioners' arguments that Congress could not have addressed a pattern of State discrimination on the basis of disability since many States have laws prohibiting such discrimination. Petitioners' Br. at 31-33. The Commission noted the sharp divergence between the sentiments expressed in State legislation and the actual reality:

> Despite . . . the fact that nearly every State has a statute prohibiting architectural barriers, such barriers continue to be a serious problem. The extent of inaccessibility was illustrated by a 1980 study of State-owned buildings housing services and programs available to the general public. The study found 76 percent of the buildings physically inaccessible by and unusable for serving [persons with disabilities], even when taking into account the option of moving programs and services to other parts of the buildings or otherwise restructuring them.[12]

See also WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, VOLUME THREE: IMPLEMENTATION PLAN 61 (1978) ("The entire conference record overwhelmingly

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[8] *Id.* at 32-35.

[9] *Id.* at 36-37.

[10] *Id.* at 39.

[11] *Id.* at 38-39.

[12] ACCOMMODATING THE SPECTRUM at 38-39, citing Noakes Associates Architects, *Access Maryland: Handicapped Accessibility Survey* (prepared under State contract) (1980), p. 17.

reflects that formal articulation of a right is one matter; the general enjoyment of that right is quite another.").[13]

The Commission on Civil Rights also listed, with extensive footnotes identifying sources in case law and professional literature, other practices involving the laws of States and activities of State officials in which persons with disabilities "are frequently denied other rights and opportunities that [nondisabled] persons take for granted." *Accommodating the Spectrum* at 39-40. These included the right to vote, to hold public office, to obtain a driver's or a hunting and fishing license, to marry and to enter into contracts, and to retain custody of their children. *Id.* at 40.[14]

The Civil Rights Commission did not discuss public employment separately due to its conclusion that employment was one of the areas in which "pervasive" discrimination "persists." *Id.* at 159, Conclusion 1. The Advisory Commission on Intergovernmental Relations (ACIR) report, however, presented specific documentation on State employment. En route to its findings that barriers to

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[13] Likewise, the congressional Task Force on the Rights and Empowerment of Americans with Disabilities found that "[t]raditional attitudes have resulted in widespread laxity in the implementation of existing disability rights and services legislation." *From ADA to Empowerment* at 20.

[14] Recognizing that a discussion of all facets of discrimination on the basis of disability was "beyond the scope of" its report, *id.* at 40, the Commission added an appendix in which it provided an outline of many areas of discrimination. In addition to areas of State discrimination already mentioned, the Appendix lists discriminatory competency and guardianship laws, *id.*, App. A, item V; denials of access to public housing, *id.*, App. A, item VII.1; discriminatory zoning obstacles, *id.*, App. A, item VII.2; overly protective fire codes and other regulations, *id.*, App. A, item VII.5; and inequities in the criminal justice system regarding the apprehension, questioning, trial, and post-conviction treatment of persons with disabilities, *id.*, App. A, item VII.5. The Commission cautioned that the areas of discrimination listed were "not exhaustive." *Id.* at 165.

government compliance with disability rights mandates include "negative employer attitudes about persons with disabilities, agency fear of the costs involved in accommodating disabled persons, lack of information about what works and what does not work, [and] unawareness of cost-effective methods of meeting mandates," ACIR, DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL at 2, Finding 5 (1989), ACIR reported on a survey of State officials it had conducted. The results of the survey indicated that 83% of the survey respondents reported that negative attitudes toward and misconceptions about people with disabilities had a moderate or strong impact on State employment of persons with disabilities, and 68% said that the lack of leadership support and commitment to employment of persons with disabilities was a strong or moderate impediment to such employment. *Id.* at 72, Table 6-10.

Likewise, the Task Force on Rights and Empowerment of Americans with Disabilities report highlighted various examples of discrimination reported to the Task Force, including a city bus driver with mental illness who was repeatedly harassed, ridiculed, and pressured to resign by his supervisor because of his disability, *From ADA to Empowerment* at 22; a young man employed as a laborer by a State Conservation Corps subjected to workplace harassment and public ridicule by his superior because of his mental retardation, *id.* at 21; a career army/reserve/national guard officer was terminated with no benefits from the Alabama National Guard when it was learned that he had been diagnosed with depression and anxiety some 25 years earlier, *id.*

Accordingly, in the ADA, Congress found, based upon extensive prior study and documented evidence, that discrimination on the basis of disability is a "serious and pervasive problem" in America, and that the States were major perpetrators of such discrimination.

2. The Documented Pattern of Discriminatory State Actions Warranted Legislative Action Under Congress's Section 5 Authority.

In calling for a comprehensive equal opportunity law in 1986, *amicus* termed discrimination on the basis of disability "the antithesis of equal opportunity," TOWARD INDEPENDENCE, App. at A-3, and quoted President Reagan's declaration that "[o]ur Nation's commitment to equal protection of the laws will have little meaning if we deny such protection to those who have not been blessed with the same physical or mental gifts we too often take for granted." *Id.* at A-4, quoting R. Reagan, *Memorandum to the Attorney General*, April 30, 1982.

In authorizing the White House Conference, Congress had made "equality of opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution" a major focus. Pub. L. No. 93-516, § 302, 88 Stat. 1631 (1974). The White House Conference reported back that "[a] review of past and current treatment of [individuals with disabilities] by all branches of government at all levels has, however, revealed an apparent utter disregard or distortion of these basic principles." WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, 59 (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated).

In considering the ADA, Congress had before it a considerable body of case law holding various forms of State discrimination on the basis of disability to be violations of the Fourteenth Amendment. In an extensive discussion of the constitutional litigation addressing discrimination on the basis of disability, the Commission on Civil Rights noted that "[t]he most frequently used constitutional bases are the guarantees of equal protection of the law and due process of the law," and devoted some four pages of its ACCOMMODATING THE SPECTRUM report to discussing the implications of the Fourteenth Amendment guarantees of equal protection of the

law and due process of law to discrimination on the basis of disability. *Id.* at 62-66.

The Commission observed that both the equal protection and due process clauses had been successfully used in litigation to secure rights for people with disabilities. *Id.* at 62, 64. The report discussed Fourteenth Amendment cases in which plaintiffs had been successful in: (1) winning the right to equal public education opportunities; (2) challenging commitment procedures and conditions of confinement in mental institutions; (3) challenging State laws permitting criminal defendants deemed mentally incompetent to be confined indefinitely without trial; (4) challenging restrictions in public employment opportunities; (5) establishing a right of persons involuntary committed to mental retardation facilities to reasonably safe conditions, freedom from unreasonable bodily restraints, and minimally adequate training; (6) challenging restrictions upon voting rights of persons with mental retardation; (7) challenging legal restrictions based on disability in occupancy of hotels and boarding houses; (8) challenging statutes authorizing involuntary psychosurgery and shock therapy; (9) challenging statutes authorizing termination of parental rights; (10) challenging involuntary sterilization procedures; and (11) challenging State institutions' decision-making procedures regarding life-prolonging medical procedures. *Id.* at 63-66.

See also WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, at 59 (presenting a similar list of area in which people with disabilities had sued to vindicate rights); U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS at 39 (Statement of Charles W. Hoehne, spokesperson for White House Conference) ("[a] growing body of judicial decisions is establishing that constitutional guarantees of equal protection and due process extend to [individuals with disabilities]").

The discussion of Fourteenth Amendment litigation challenging discrimination on the basis of disability in ACCOMMODATING THE SPECTRUM, while extensive, was not exhaustive either at the Supreme Court level or otherwise. And such court decisions continued in the period between the issuance of ACCOMMODATING THE SPECTRUM in 1983 and the passage of the ADA in 1990, the most significant of which, for present purposes, was *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), in which the Court held that a zoning board's denial of special exception to permit a group home for persons with mental retardation in a residential neighborhood was irrational and violated the Fourteenth Amendment. The *Cleburne* ruling was discussed in *amicus*'s analysis of its original proposal to Congress that an ADA should be enacted. TOWARD INDEPENDENCE, App. at A-7. The *Cleburne* decision makes it abundantly clear that some types of discriminatory actions by governmental entities violate equal protection because they are not "rational."

Petitioners rely strongly on the fact that this Court ruled in *Cleburne* that persons with mental retardation do not constitute a suspect class. Petitioners' Br. at 25-27. *Amicus* believes that exclusions and deprivations visited upon people because of their disabilities should be accorded some degree of heightened scrutiny because such disadvantageous treatment is often, as the Court observed in *Cleburne*, the product of "negative attitudes," "fear," and "irrational prejudice." *Cleburne*, 473 U.S. at 448, 450. But, as *Cleburne* demonstrates, State actions that discriminate on the basis of disability can violate the Fourteenth Amendment without heightened scrutiny.

The implication of Petitioners' analysis is that Congress has no role to play in addressing classifications that are not subject to heightened scrutiny under the equal protection clause. But in situations where, as with disability, "negative attitudes" and "irrational prejudice" toward a class of citizens have become the accepted practice and the standard way of dealing with those citizens, and have become ingrained in the

policies, practices, and even the facilities of American society, including particularly State governments and their components, Congress is exercising a fundamentally important role under the Fourteenth Amendment when it identifies and prohibits such irrational actions.

II. In Considering and Passing the ADA, Congress Negotiated and Crafted Modest, Congruent, and Proportional Remedies for Irrational and Unfair Discrimination on the Basis of Disability.

A. The ADA Prohibits Irrational and Unfair Discrimination by the States.

The ADA was concerned with prohibiting "unnecessary" and "unfair" unequal treatment of people with disabilities. 42 U.S.C. § 12101(a)(9). *See also* TOWARD INDEPENDENCE, App. at A-3 ("Discrimination consists of the unnecessary and unfair deprivation of an opportunity because of some characteristic of a person. It is the antithesis of equal opportunity."); *id.* at 19 ("unfair or unnecessary exclusion or disadvantage").

Congress understood that, except in those limited circumstances where disability actually prevents participation, excluding individuals based on disability is intrinsically irrational and unfair, and that lesser types of discrimination prohibited by the ADA -- such as unjustified segregation; relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; and overprotective rules and policies -- are irrational because they penalize people for a characteristic that they are unable to change and that does not inherently prevent them from participating on an equal basis. Thus one of the ADA findings was that "individuals with disabilities . . . have been faced with restrictions and limitations . . . based on characteristics that are beyond the control of each individual and resulting from stereotypic

assumptions not truly indicative of the individual ability of such individuals to participate . . ." 42 U.S.C. § 12101(a)(7).[15]

In addition, exclusions and relegations to lesser status and opportunities on the basis of disability usually occur without the opportunity for the person being excluded or disadvantaged to be heard to challenge the unequal treatment as unfair and unnecessary. This, along with the "fundamental unfairness" involved in many instances of State actions disadvantaging people because of their disabilities, raises substantial due process concerns.

Congress concluded that irrational denials of equality by state actors violate the Equal Protection Clause of the Fourteenth Amendment. And state and local government's arbitrary and summary deprivations of substantial rights and opportunities without a chance to be heard in opposition violate due process requirements of procedural protections and "fundamental fairness."

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[15] Discrimination by the States carries an extra element of irrationality, because of the States' fiscal and legal responsibilities. Denials of public employment opportunities, or of employment-related services such as public transportation or job training programs, because of potential workers' disabilities, bring with them a statistically strong likelihood that the State will end up paying income support for jobless people with disabilities, as well as losing potential income tax revenue the individuals would have paid if employed, and potential sales tax revenue from their spending if they had been employed. Financial consequences were frequent considerations during ADA deliberations. *See*, e.g., 42 U.S.C. § 12101(a)(9) (ADA finding that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"; TOWARD INDEPENDENCE at vi (estimating annual federal expenditures for disability at over $60 billion); *FROM ADA TO EMPOWERMENT* at 27 (quoting President Bush's estimate that "when you add together federal, state, local, and private funds, it costs almost $200 billion annually to support Americans with disabilities -- in effect to keep them dependent").

B. Simply Proscribing Intentional Differential Treatment Because of Disability Would Achieve a Mere Facade of Formal Equality, Not Real Equality in the Form of Meaningful Equal Opportunity.

One of the key lessons that Congress derived from its twenty-five years of study and field-testing[16] of disability nondiscrimination laws was that a broadly-worded prohibition of discrimination on the basis of disability -- a simple requirement that "Thou shalt not discriminate" -- is not sufficient to address such discrimination. Congress enacted the ADA with an express purpose "to provide clear, strong, consistent, and enforceable standards addressing

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[16] Key elements of the nondiscrimination requirement, such as reasonable accommodation, auxiliary aids, and restrictions on disability inquiries, were initially developed and field-tested in federal regulations issued, with the benefit of formal public comment, under Sections 501, 503, and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793, & 794a. Similarly, the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat.1619, broke new ground in establishing a statutory "reasonable accommodation" requirement, 42 U.S.C. § 3604(f)(3)(B), prohibiting discrimination against someone because he or she associates with a person who has a disability, *id.* §§ 3604(f)(2)(B)-(C), and imposing accessibility standards on the design and future construction of covered facilities, *id.* § 3604(f)(3)(C) – all concepts that would play important roles in the ADA.

Regarding the coverage of State and local governments, the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), added a definition of "program or activity" to, inter alia, Section 504 of the Rehabilitation Act of 1973. The amended definition expanded Section 504's coverage of State and local government bodies by clarifying that all of the operations of a department or agency that receives federal funds are covered, regardless of how separate they may be from the federally assisted project or activity; and that if a state or local department or agency receives federal funds to be distributed to other departments or agencies, both the entity that distributes the funds and the entities that receive the funds are covered. 29 U.S.C. §§ 794(b)(1)(A)-(B). *SEE* S. REP. NO. 64 100th Cong., 2d Sess. 16 (1988) (Labor and Human Resources Committee), reprinted in 1988 U.S.C.C.A.N. 3, 18.

discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2).

In going beyond an ineffective, broad renunciation of inequality on the basis of disability, Congress put into action what it had learned about the nature and forms of disability discrimination during its quarter century of study. Petitioners urge, however, that the ADA's "disparate-effect and reasonable-accommodation requirements far exceed the minimal strictures of rational-basis review." Petitioners' Br. at 29.[17] This contention reflects a superficial misunderstanding of these ADA requirements and their role in eliminating irrational and unfair discrimination. Both of the cited provisions demand no more of States than rational and fair conduct. It should be noted, however, that even if a particular requirement of the statute did exceed the limits of congressional authority to some degree, that would only justify a judicial restriction or excision of the overextended portion of the provision, particularly since the ADA contains a severability provision. 42 U.S.C. § 12213. It would not invalidate congressional authority to regulate the extensive

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[17] Petitioners also mention the ADA requirement on a State "to make 'reasonable modifications' in its public services to accommodate the disabled unless they would 'fundamentally alter' the nature of the program." Petitioners' Br. at 29. It may be helpful to clarify, however, that the potentially more difficult or expensive types of undertakings -- physical and structural modifications and providing equipment, devices, or assistive personnel -- are not required under this provision, but are covered in the program accessibility section of the regulations as either facility accessibility modifications, 28 C.F.R. §35.150, or as "auxiliary aids," *id.*, § 35.160(b)(1). In both cases, the obligation is subject to a defense that excuses covered entities from taking any action that causes "undue financial and administrative burdens." *Id.*, §§ 35.150(a)(3), 35.164. The "reasonable modifications" provision referred to by the Petitioners addresses less difficult and less potentially costly modifications to "policies, practices, and procedures" to permit a particular individual with a disability to participate equally. *Id.* § 35.130(b)(7). Typically, these involve relaxation of or an exception to some general rule or policy that would otherwise operate to exclude a qualified individual from participation.

remaining areas of States' conduct that do fall within Congress's section 5 authority.

1. Identical Treatment Can Result in Discrimination.

A meeting of a city council may be "equally open to all" in one sense, but if it is held in an auditorium that can only be entered by going up a flight of stairs it offers no chance of equal participation for a person who uses a wheelchair. A blind person who has rushed to a public hospital for a medical emergency may have an "equal" opportunity to receive the "informed consent" documents describing risks of treatment, but the gesture will not have any real meaning if there is no one who will read the documents to the patient or make them available in an alternative format. Verbal instructions regarding a State civil service test may be articulated "equally" to all, but will be of no avail to a test-taker who is deaf. These are simple examples of the fact that treating everyone identically and ignoring the existence of disabilities may appear to treat all persons the same, but would in fact represent drastic denials of equality to some people because of their disabilities. As the Civil Rights Commission has noted, "[s]uch an approach [of identical treatment] would give the form, but not the substance of equal opportunity." ACCOMMODATING THE SPECTRUM at 99.

In *Alexander v. Choate*, *supra*, the Court indicated that, in the context of Section 504 in its application to state activities, "meaningful access" was required, and that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." 469 U.S. at 301. ADA Committee reports indicate expressly that Title II's prohibition of discrimination on the basis of disability is to be interpreted consistently with the decision in *Alexander v. Choate*. S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485, pt. 2, at 84 (1990). For the ADA to provide real equality, therefore, such requirements as reasonable accommodation, barrier removal, and auxiliary aids had to be essential components; identical treatment would not suffice.

2. Exclusion and Other Egregious Deprivations on the Basis of Disability Often Occur in the Absence of Hostile Animus.

The Court made an observation in *Alexander v. Choate*, 469 U.S. 287 (1985), in the context of Section 504 that is equally true in the Fourteenth Amendment context of the ADA: "much of the conduct that Congress sought to alter ... would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. The Court cited architectural and transportation barriers as examples of forms of discrimination that needed to be eliminated whether or not they were erected with an intent of excluding people with disabilities. *Id.* at 297. Simply proscribing intentional differential treatment on the basis of disability would leave in place most of the barriers, practices, and policies that deprive people of equal participation in State services, programs, and job opportunities because of disability.

To a person who uses a wheelchair and is confronted by a flight of stairs that makes it impossible to enter the State employment application office, it makes no difference whatever whether those stairs were designed and constructed with a deliberate intent to keep people in wheelchairs out or whether they were designed and constructed without any thought at all about their effect on persons who use wheelchairs. A law that sought to enforce equality by declaring only the provably intentional barriers illegal would miss the mark almost entirely, because it would be a rare case in which the designers and constructors of State facilities would generate documentation or demonstrable evidence that they were openly hostile to people who use wheelchairs.

Other language of the Court in *Alexander v. Choate* indicates that, while "well-cataloged instances of invidious discrimination" against the disabled exist, *id.* at n.12, discrimination on the basis of disability may be the result of apathetic attitudes rather than affirmative animus," *id.* at 296. Nevertheless, treatment of people with disabilities is "one of

the country's 'shameful oversights'" and constitutes "glaring neglect," *id.*, quoting 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik) and 118 CONG. REC. 526 (statement of Rep. Percy). Such inattention is not a neutral, rational act; it is based upon prejudice, stereotypes, and callous indifference -- an assumption that people with disabilities will not participate.[18]

For State and local governments to ignore the existence of people with disabilities in planning and structuring their services and programs, and in designing and erecting their facilities, goes well beyond inadvertence and simple negligence and amounts to reckless indifference or a form of intentionality -- a looking away and denying the existence of persons with disabilities in the face of abundant evidence to the contrary.[19]

People with disabilities are inevitably part of the citizenry whom state and local governments are charged with serving, many of which are taxpayers for such services. It is totally foreseeable that some potential public workers will, because of disabilities, need reasonable adjustments to workplaces designed, with one-size-fits-all assumptions, for those without disabilities. It is totally foreseeable that some capable and qualified workers with respiratory and other conditions will be needlessly excluded if a State agency

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[18] One of the Conclusions of the Commission on Civil Rights was that "[a]lthough open hostility is now rare, prejudice against [people with disabilities], manifested as discomfort, patronization, pity, stereotyping, and stigmatization, remains common." ACCOMMODATING THE SPECTRUM at 159, Conclusion 2.

[19] *See*, e.g., Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment*, 19 (1990) (Task Force finding that "[d]isability has become a predictable part of the normal life cycle for a large and increasing proportion of human beings.") In the words of one federal statute, "disability is a normal part of the human experience . . ." 29 U.S.C. § 701(a)(3), as amended by Pub. L. No. 102-569, tit. I, §101, 106 Stat. 4346.

unnecessarily allows carbon monoxide fumes in its vehicles and cigarette smoke in its work facilities, as is alleged by Mr. Ash in this case.

Moreover, an effective law prohibiting unfair and irrational discrimination must require the dismantling of practices and structures excluding or disadvantaging persons with disabilities that are "literally been built into the physical environment," TOWARD INDEPENDENCE, App. at A-3, or in the accepted policies and practices of agencies that have a tendency to endure, often outliving their original rationale, in the tradition of "things have always been done that way." ACCOMMODATING THE SPECTRUM at 91. A prejudiced, erroneous belief that deaf people cannot drive safely or that blind people cannot be attorneys may be perpetuated in a formal rule or an unwritten policy, and may guide the actions of a State agency long after the originator of the rule or policy has left the agency or died. Such entrenched mechanisms of discrimination continue to operate without regard to whether any current or prior intent to discriminate can be proven.

C. Congress Negotiated and Crafted Modest, Congruent, and Proportional Requirements and Coverage.

Congress understood that something beyond simply treating everyone exactly the same and ignoring the existence of disabilities was necessary to address disability discrimination, particularly since "[s]ociety's operations -- from its sidewalks to its schoolrooms and its jobs -- ordinarily are designed for people whose abilities fall in the `normal' range," and "exclude or seriously disadvantage" people not within the "normal" range. ACCOMMODATING THE SPECTRUM at 161, Conclusion 4. This recognition led Congress to include in the ADA key provisions, including the requirement of reasonable accommodations, the requirement of barrier removal, proscribing standards or methods administration that have the effect of discrimination, the requirement of providing auxiliary aids, and the prohibition of discriminatory qualification standards and selection criteria, all of which had

been developed and "test-driven" under prior statutes and regulations. In Congress' view, a rational public entity would take such reasonable steps to assure meaningful equal participation of individuals with disabilities in all of its jobs, programs, and activities. The reasonable accommodation provision, for example, only requires States to make *reasonable* modifications to "known" limitations and does not require any action that would impose an "undue hardship." 42 U.S.C. § 12112(b)(5)(A). For government entities which provide various accommodations designed for employees and constituencies without disabilities[20] to refuse to make reasonable modifications and take other reasonable steps to permit the equal participation of citizens with disabilities is irrational and manifestly unfair.

These provisions were carefully fine-tuned during extensive congressional consideration and debates. For a description of negotiations and compromises, *see, e.g.*, 135 CONG. REC. S 10713 (Daily Ed. Sept. 7, 1989) (statement of Sen. Harkin); 136 CONG. REC. S 9686 (Daily Ed. July 13, 1990) (statement of Sen. Harkin); 135 CONG. REC. S 10715 (Daily Ed. Sept. 7, 1989) (statement of Sen. Hatch).; 136 CONG. REC. H 2429 (Daily Ed. May 17, 1990) (statement of Rep. Bartlett).

Amicus believes that its original version of the ADA was a moderate, equitable proposal. Yet Congress saw fit to ameliorate many of the standards *amicus* had proposed and to craft additional defenses and limitations. Far from making ADA standards too severe and thus over-reaching its constitutional authority, *amicus* is convinced that Congress

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[20] For a description of the numerous accommodations that businesses and government facilities routinely provide for employees without disabilities, see Robert L. Burgdorf Jr., *"Substantially limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 529-33 (1997).

moved in the direction of crafting standards that are unnecessarily lenient and limited.

Likewise, *amicus* considers that the protection of the statute based on its definition of "disability," 42 U.S.C. § 12102(2), as construed by this Court in *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999); and *Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999), and by numerous lower courts is not only not incongruously or disproportionately overextensive, it is in fact overly restrictive. It is defendants, not plaintiffs, who are predominantly successful in ADA litigation. The ADA's requirements and coverage certainly are not incongruous or disproportionate in relation to the serious pattern of State discrimination they address.

CONCLUSION

The ADA is sound legislation, based upon careful congressional consideration and an extraordinarily extensive documentary and informational record. Unlike what may have been the situation in other cases the Court has heard in recent years, in deciding to apply the ADA to the States, Congress did its homework. To invalidate this effort would be to frustrate the considered deliberate judgment of a nearly unanimous Congress, to ignore the strong support of the Executive Branch, and to frustrate the will of the strong majority of American citizens who support the ADA. Appropriate are the words of Representative Dellums, who, on the day that the ADA was passing by an overwhelming margin in the House of Representatives, declared:

> It is at times like these, Mr. Speaker, when I am proud to be a Member of this body. We must remember that we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are "able-bodied," not just those who own

> property -- but every citizen shall enjoy the equal protection of the laws.
>
> Indeed, as the Supreme Court has noted:
>
> > It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

136 CONG. REC. H2639 (Daily Ed. May 22, 1990) (statement of Rep. Dellums) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980).

For the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Appendix

Congressionally Commissioned Studies of Discrimination on the Basis of Disability

(1) National Commission on Architectural Barriers

Agency:	National Commission on Architectural Barriers to Rehabilitation of the Handicapped.
Established:	Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965).
Mission:	To conduct a three-year study of the extent to which architectural barriers prevented access to public buildings and to propose measures to eliminate existing barriers and prevent new ones from being created.
Relevant Report:	*Design for All Americans: Report of the National Commission on Architectural Barriers to Rehabilitation of the Handicapped* (U.S. Department of Health, Education, and Welfare, 1967).
Overall Relevant Results:	Described "unnecessary barriers: a stairway, a too-narrow door, a too-high telephone" as "unnecessary obstacles that prevent millions of people with disabilities from functioning adequately and being productive," and included a series of recommendations for eliminating and avoiding the creation of architectural barriers. *Id.* at 2. Follow-up Senate and House Committee hearings in 1967 and 1968 [21] ultimately produced

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[21] *Hearings on Accessibility of Public Buildings to the Physically Handicapped Before the Subcommittee on Public Buildings and Grounds of the Senate Committee on Public Works*, 90th Cong. (1967); *Hearings on Building Design for the Physically Disabled Before the Subcommittee on Public Buildings on Grounds of the House Committee on Public Works*, 90th Cong. (1968). *See also* S. Rep. No. 90-538 (1968), *reprinted in* 1968 U.S.C.C.A.N., 3214; H.R. Rep. No. 90-1532 (1968); H.R. Conf. Rep. No. 90-1787 (1968).

the Architectural Barriers Act of 1968. Pub. L. No. 90-480, § 1, 82 Stat. 718 (1968), *codified as amended at* 42 U.S.C. §§ 4151-57.

(2) White House Conference

Agency: White House Conference on Handicapped Individuals.

Established: White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, §§ 300-306, 88 Stat. 1631 (1974).

Mission: To convene a national gathering "to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with [disabilities]," *id.*, § 302, with equal protection as a key focus, *id.*, § 301(4).

Relevant Reports: (a) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SUMMARY FINAL REPORT (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated [1978]);

(b) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, VOLUME THREE: IMPLEMENTATION PLAN 61 (1978); and

(c) WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, SPECIAL CONCERNS: STATE WHITE HOUSE CONFERENCE WORKBOOK, 59 (U.S. Dept. of Health, Education, and Welfare, Office of Human Development, undated [1977]).

Overall Relevant Results: Convened national meeting of approximately 3,700 individuals from every state and U.S. territory, representing over 100,000 people who attended local, state, and territorial conferences, in Washington, DC, in May 1977.

Final Report of the Conference to the President and the Congress presented 815 formal recommendations addressing 287 issues.

(3) Commission on Civil Rights

Agency: United States Commission on Civil Rights.

Established: Pub. L. No. 95-444, 92 Stat. 1067 (1978) (added "discrimination on the basis of handicap" to the Commission's areas of jurisdiction).

Mission: To study and collect information concerning legal developments constituting discrimination because of, *inter alia*, "handicap;" serve as a national clearinghouse of information on such discrimination; and submit reports, findings, and recommendations to the President and Congress.

Relevant Reports: (a) ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); and

(b) U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMERICANS: PUBLIC POLICY IMPLICATIONS (1980) (record of "consultation" receiving testimony of 30 "selected authorities, advocates, consumers, and practitioners who are acknowledged experts," *id.* at 1).

Overall Relevant Results: Surveyed the types of discrimination people with disabilities encountered and provided both a summary of case law and a conceptual framework for understanding and addressing discrimination on the basis of disability.

(4) National Council on Disability

Agency: National Council on Disability.

Established: Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984) (codified as amended at 29 U.S.C. § 781).

Mission: To review federal laws and programs affecting people with disabilities and make recommendations regarding ways to make such laws and programs more effective.

Relevant Reports: (a) TOWARD INDEPENDENCE (1986); and

(b) ON THE THRESHOLD OF INDEPENDENCE (Andrea H. Farbman ed., 1988).

Overall Relevant Results: Described need for and concept of proposed new law to be called the Americans with Disabilities Act; developed and published original version of the ADA introduced in Congress in 1988.

(5) Advisory Commission on Intergovernmental Relations

Agency: Advisory Commission on Intergovernmental Relations.

Established: Pub. L. No. 86-380, 73 Stat. 703 (1959).

Mission: To study the relationship among local, state, and federal governments in the American federal system and to recommend improvements.

Relevant Reports: DISABILITY RIGHTS MANDATES: FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS AND ARCHITECTURAL BARRIER REMOVAL (1989).

Overall Relevant Results: Identified various barriers to governmental compliance with disability rights mandates, and reported results of survey of State officials regarding their assessment of impediments to employment of persons with disabilities in State government.

(6) GAO Accommodations Study

Agency:	General Accounting Office (GAO).
Established:	Request to GAO by members of Congress in January 1990.
Mission:	To provide information about the costs of workplace accommodations and of avoiding or removing architectural, transportation, and communication barriers, to assist in congressional consideration of the ADA.
Relevant Report:	U.S. General Accounting Office, *Persons with Disabilities: Reports on Costs of Accommodations*, A Briefing Report to Congressional Requesters (January 4, 1990).
Overall Relevant Results:	Conducted literature review of published studies going back to 1975, queried wide range of industry groups and disability organizations, and identified twelve reports with relevant information, of which all but one were either conducted by or funded under contract by a federal government agency.

(7) Task Force on Rights and Empowerment

Agency:	Task Force on the Rights and Empowerment of Americans with Disabilities.
Established:	Appointed by the Chairman of the House Subcommittee on Select Education in May 1988.
Mission:	To gather information on the extent and nature of disability discrimination.

Relevant Reports:	(a) Eleven interim reports submitted to Congress and testimony provided at hearings on the ADA in both the House and Senate;[22] and (b) *From ADA to Empowerment; The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* (1990).
Overall Relevant Results:	Conducted 63 public forums around the country attended by over 7,000 persons with disabilities, their families, advocates and service providers; concluded generally that Americans with disabilities face "massive, society-wide discrimination and paternalism." *Id.* at 18, 19.

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[22] *See.* S. Rep. No. 101-116, at 4, 6, 8-9, 16, 17 (1989); *Americans with Disabilities Act of 1989; Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong. At 18-20, 252-58 (1989); H.R. Rep. No. 101-485, pt. 2. At 25, 26, 27-28 (1990); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. At 1038-43, 1328-35 (1988): From ADA to Empowerment: *The Report of the Task Force on Rights and Empowerment of Americans with Disabilities*, at 18 (1990).